UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	Criminal No. 99-19-B-S
	)	Civil No. 02-178-B-S
	)	
BRIAN EUGENE MESERVE,	)	
	)	
	)	

RECOMMENDED DECISION ON MOTION FOR A NEW TRIAL AND MOTION TO VACATE

Brian Meserve has filed a motion for a new trial (Docket No. 89) and a motion to vacate (Docket No. 92). I now recommend that the court **DENY** the motion for a new trial and summarily **DISMISS** the motion to vacate.

Procedural Background

Meserve was found guilty of robbery and related firearms charges on October 21, 1999, following a jury trial before the Honorable Morton A. Brody. Following the verdict, Meserve filed a motion for a new trial. On July 20, 2000, I issued a recommended decision denying the motion for a new trial following an evidentiary hearing. That decision was affirmed by the District Court and on August 31, 2000, Meserve was sentenced. His conviction was affirmed on direct appeal, the United States Court of Appeals issuing its mandate on January 18, 2002. See United States v. Meserve, 271 F.3d 314 (1st Cir. 2001). On October 21, 2002, Meserve filed his second motion for a new trial. After the United States filed its response to that motion, Meserve, on November 15, 2002, filed a motion to vacate. I have not ordered that the United States

Attorney answer the motion to vacate because I believe it is appropriately subject to summary dismissal pursuant to the terms of Rule 4 (b), Rules – Section 2255 Proceedings, 28 foll. § 2255. I now address both motions.

Meserve argues nine separate grounds in his motion for a new trial. Eight of those grounds relate to Holly Grant's allegedly perjured testimony and/or the United States' failure to disclose information known to it about Holly Grant. The ninth issue concerns Freeman Del Taylor who has allegedly confessed to this robbery or one similar to it. The motion to vacate raises seven separate grounds. The first six grounds apparently relate to the same Holly Grant issues as are raised in the motion for a new trial, although the supporting facts simply refer to "the key government witness at petitioner's trial" without further elaboration. The seventh ground is cast as an ineffective assistance of counsel claim and alleges for supporting facts that "[d]efendant's counsel failed (sic) to challenge known false testimony regarding the location, possession and use of the firearm purported to be used in the crime represented ineffective assistance by defendant's counsel."

Motion for a New Trial

In order to prevail on his motion for a new trial based upon newly discovered evidence, Meserve has the burden of establishing each component of a four-prong test. Meserve must establish the following: (1) the evidence was unknown or unavailable to him at the time of the trial; (2) that he was duly diligent in attempting to discover it; (3) the evidence is material, and not merely cumulative or impeaching; and (4) it will probably result in an acquittal upon retrial. United States v. Desir, 273 F.3d 39, 42 (1st Cir. 2001); United States v. Angiulo, 847 F.2d 956, 983-84 (1st Cir. 1988). A defendant's

new trial motion must be denied if he fails to meet any one of these factors. United States v. Falu-Gonzalez, 205 F.3d 436, 442 (1st Cir. 2000).

Meserve also claims that the United States failed to disclose exculpatory information in its possession required to be disclosed by Brady v. Maryland, 373 U.S. 83 (1963). If the United States failed to disclose information required by Brady, then a more "defendant–friendly" standard applies and Meserve need only establish that "(1) the evidence at issue is material and favorable to the accused; (2) the evidence was suppressed by the prosecution; and (3) the defendant was prejudiced by the suppression in that there is "'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" United States v. Conley, 249 F.3d 38, 45 (1st. Cir. 2001) (quoting Strickler v. Greene, 527 U.S. 263, 280 (1999)). What is more, if the United States knowingly used perjured testimony to obtain a conviction, the standard a defendant must meet vis-à-vis the third prong is "'any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" United States v. Gonzalez-Gonzalez, 258 F.3d 16, 21 (1st Cir. 2001) (quoting United States v. Agurs, 427 U.S. 97, 103 (1976)).

The eight complaints about Holly Grant's testimony are summarized thusly: (1) she lied at Meserve's trial when she said she had "taken care" of the Indiana operating under the influence (OUI) charges; (2) Grant lied, and the prosecutor knew she lied, at an unrelated state child custody proceeding when she told the state court judge that she had taken care of the Indiana charge; (3) the prosecution suppressed evidence of additional inducements to testify extended to Grant regarding her Indiana OUI charge, her credit card theft charge in Maine, and her Maine habitual offender driving charge; (4) the

prosecution also suppressed information on additional inducements extended to Grant regarding Maine State Police Sergeant Gerald Madden's testimony during Grant's state child custody case and other "helpful" conduct by Sergeant Madden regarding the recalling of warrants for Grant's arrest; (5) the United States failed to correct the record regarding the status of Grant's Indiana drunk driving charge during the course of Meserve's trial; (6) Elizabeth Handy's affidavit regarding the date and time when Grant dropped her child off for daycare contains important factual information that contradicts Grant's sworn trial testimony; (7) Grant never went to George Christie's house on the night in question; and (8) Grant allegedly told her ex-boyfriend, David Bragg, that she lied when she testified at Meserve's trial.

The other piece of "newly discovered evidence" put forth by Meserve, not directly related to Holly Grant, is that during the summer of 1998 someone by the name of Freeman Del Taylor told Derek Baker that he had committed a robbery in the spring of 1998 while armed with a sawed-off shotgun. According to Baker, Taylor threw the gun on the side of the road and when he went back a few days later to retrieve it the gun was gone. These circumstances are similar to the circumstances of the robbery for which Meserve was convicted. Baker first told Meserve about this conversation in February 2001 when Baker and Meserve were housed together at the Maine Correctional Center in Windham, Maine.

1. Impeachment of Holly Grant's Testimony at Meserve's Trial

The jury that convicted Meserve knew a great deal about Holly Grant as a consequence of her cross examination by Meserve's attorney. (See Tr. at 113 -41, 147-52.) Grant, Meserve's ex-girlfriend, was, by her own admission, a participant in this

armed robbery and her trial testimony had been obtained by the United States in exchange for its promise not to prosecute her for that robbery. (Id. at 120-21.) The jurors also knew that Grant was guilty of prior bad acts including stealing her grandmother's credit card and receiving welfare benefits illegitimately. (Id. 120-25.) See Meserve, 271 F.3d at 331. The jury learned of convictions on misdemeanor worthless check charges and also that she had a habitual offender driving record. (Id. at 129-32.) They learned that she abused alcohol and controlled substances, including angel dust, acid, and marijuana. (Id. at 117-19.) They learned that she worked as an exotic dancer and had used various names other than her own. (Id. at 126-28.) It was mentioned during cross-examination that Grant had lied to state representatives regarding her son's living arrangements in order to obtain Aid to Family with Dependent Children benefits. (Id. at 147-49.) They also heard her being questioned about whether she had ever told Tammy Nadeau that Meserve was not involved in the robbery and that she had lied about his involvement to obtain custody of her son. (Id. at 133-34.) Finally, the jury knew that Sergeant Madden of the Maine State Police had testified on Grant's behalf at a child custody hearing in state court and had assisted her in dealing with the check charges. (Id. at 125-26.)

Meserve's "new" evidence does not meet the four prongs necessary under the new trial standard. Meserve's additional exhibits relating to Holly Grant's testimony are merely cumulative of impeachment evidence that was already before the jury. Furthermore, all of those impeaching documents, with the exception of the 2001 dismissal of the theft charge in Maine, were available and known to the defendant at the time of his trial. Even if Meserve did not have the actual documents in his possession, he

was aware of the various incidents and could have brought them to the jury's attention. The jury, as I said, knew the salient facts about Grant's situation and there is no reasonable likelihood that if it had known the further details of this chronology it would have arrived at any different result. In any event, had Meserve chosen to present those details in greater elaboration to the jury, the information could have been available to him in 1999 had he exercised due diligence to obtain it from Indiana and the state courts.

To the extent that Meserve claims that he now has exhibits that would establish that Grant committed perjury when she testified at his trial about her prior criminal record, about the visit to George Christie's house, and about the help she received from state agents regarding other charges and her child custody case, this information is either cumulative of impeaching material actually presented at trial or, as in the case of the Christie affidavit, information that would have been known to Meserve had he exercised due diligence. In any event Meserve cannot satisfy all four of the prongs necessary to obtain a new trial.

2. Holly Grant's Alleged Perjury at the Child Custody Hearing

The record developed in support of this motion for a new trial does not support the contention that Holly Grant committed perjury at the state child custody hearing, let alone that the United States knowingly concealed her perjury from Meserve. Meserve's complaint is that Holly Grant testified at the child custody trial that she had "taken care of" the Indiana drunk driving charge. In fact, she had pled guilty to the charge but she had not yet paid her fine or completed her sentence. Even if the United States knew or should have known that Grant had so testified at her state child custody proceeding, it is hard to imagine how its failure to disclose this testimony amounted to concealment of

perjury. Reasonable minds might even differ about whether or not Grant's testimony was less than truthful, but no one would seriously argue that it was perjurious in the context of the child custody hearing. Furthermore, Meserve knew, or could easily have learned, of the precise status of the Indiana charges prior to his own trial. He was well aware of both the pending child custody proceeding and the Indiana drunk driving charge. The custody order that includes reference to Grant's "took care of the charge" representation is dated April 25, 1999. Therefore, I conclude that Merserve cannot profit from the defendant friendly treatment for claims that the prosecution concealed perjury, see Gonzalez-Gonzalez, 258 F.3d at 21, because there was no concealment of perjury by the prosecution, a predicate to his claim. Conley, 249 F.3d at 45.

Meserve also claims that the prosecution suppressed evidence of additional inducements to testify that it extended to Grant with respect to her Indiana OUI charge, her credit card theft charges, and her Maine habitual offender driving charge. Furthermore, he complains that the prosecution concealed information about such inducement procured by Sergeant Madden's testimony on behalf of Grant at her child custody proceedings. As indicate above in discussing the impeachment of Grant at trial, the defense was well aware of these sore points and succeeded in impeaching Grant on these concerns. The exhibits filed with the motion for a new trial contain no smoking gun with regards to concealment of material and favorable evidence of governmental inducements of Grant. Conley, 249 F.3d at 45

3. Holly Grant's Alleged Recantation of Her Involvement in the Robbery

Meserve claims that in the summer of 1999 Holly Grant told David Bragg, "that she never did a Robbery." Bragg executed an affidavit to that effect on October 3, 2000.

Bragg indicates in his affidavit signed in 2000 that the last time he saw Grant was before she testified at Meserve's trial and that she had indicated to him that "she felt bad for Meserve, because she had made the whole story up." Meserve does not explain why this information could not have been discovered prior to his trial in October 1999.

At the trial Grant was asked on cross-examination if she had previously been involved in a relationship with David Bragg. (Tr. p. 137). She acknowledged that she had been so involved during the spring of 1999. (Id. at 137.) Since Bragg's existence was apparently known to Meserve, there does not appear to have been any reason why he could not have obtained this impeaching material prior to trial had he exercised due diligence. I do not find that the Bragg affidavit warrants a new trial.

4. The Derek Baker Affidavit

Meserve raises one issue unrelated directly to Holly Grant in his motion for a new trial premised on the affidavit of Derek Baker. (Mot. New Trial Ex. J-1.) Derek Baker became acquainted with Brian Meserve in late February 2001 when they were both housed as inmates at the Maine Correctional Center. At that time he told Meserve about a conversation he, Baker, had had with a Freeman Del Taylor during the summer of 1998. Taylor allegedly told Baker in 1998 that he committed an unspecified robbery during the spring of 1998 and that he had never been caught for it. Taylor told him he committed the robbery with a twelve gauge sawed-off shotgun and that he wore a bullet proof vest and a ski-mask. Taylor stated that he threw the gun on the side of a road after the robbery and he went back to the area where he threw the gun a couple of days later to retrieve the gun but that it was gone. Baker's affidavit does not identify the Ferris Market robbery by

name or location, although these details are similar to some of the details of the robbery attributed to Grant and Meserve.

The existence of Del Taylor and the possibility that he was a suspect in this robbery was not news to Meserve. Taylor's name came up at trial when he was identified as the initial suspect in the case (Tr. at 74-75.) If, as Meserve alleges in his unsworn memorandum, there is a connection between Del Taylor and Holly Grant that goes back to high school, that sort of information could have been fleshed out by him before trial with the exercise of due diligence. On the record currently before me, Del Taylor does not match the description of the robber, there is no reason to connect him with Holly Grant, and the alleged statement he made to Baker is ambiguous, to say the least. While the evidence of the Taylor statement may have indeed been unavailable to Meserve at the time of the trial, its eleventh hour materialization does not satisfy the fourth prong of the new trial standard as it is not the sort of newly discovered evidence that will likely result in an acquittal upon retrial.

Motion to Vacate

Meserve's motion to vacate, filed pursuant to 28 U.S.C. § 2255, fares no better than his motion for a new trial. Grounds One through Six of the motion to vacate are nothing but a rehash of the Holly Grant issues raised by the motion for a new trial. The First Circuit applies the same newly discovered evidence standard to motions to vacate and motions for a new trial. See Awon v. United States, 308 F.3d 133, 140 (1st Cir. 2002). With respect to Meserve's seventh ground, his proffer of "supporting facts" is nothing more than a conclusory assertion that his attorney failed to challenge known false testimony about the location, possession, and use of a firearm. The First Circuit has

made it clear that it is permissible to summarily deny cognizable 28 U.S.C. § 2255 claims that merely state conclusions without specific and detailed supporting facts. United States v. Butt, 731 F.2d 75, 77 (1st Cir. 1984); see also Siciliano v. Vose, 834 F.2d 29, 31 (1st Cir. 1987) (affirming summary denial of conclusory ineffective assistance of counsel claim).

Conclusion

Based upon the foregoing, I recommend that the court **DENY** the motion for a new trial and summarily **DISMISS** the motion to vacate.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

December 27, 2002

Margaret J. Kravchuk
U.S. Magistrate Judge

CJACNS

CLOSED

U.S. District Court
District of Maine (Bangor)

CRIMINAL DOCKET FOR CASE #: 99-CR-19-ALL

USA v. MESERVE Filed: 04/13/99
Other Dkt # 1:99-m -00002
Case Assigned to: Judge GEORGE Z. SINGAL

BRIAN EUGENE MESERVE (1)
defendant
[term 08/31/00]

STEVEN LYMAN, ESQ.
[COR LD NTC ret]
96 HARLOW STREET
BANGOR, ME 04401
947-6514

BRIAN EUGENE MESERVE
[term 08/31/00]
[COR LD NTC] [PRO SE]
45 Congress Street
Belfast, ME 04915

Pending Counts:	Disposition
18:1951.F INTERFERENCE WITH COMMERCE BY THREAT OR VIOLENCE HOBBS ACT ROBBERY (1s)	Imprisonment of 100 months on each of Counts 1s, 3s and 4s, to be served concurrently and a term of 120 months on Count 2s, to be served consecutively to the sentences imposed on Cts 1s, 3s and 4s. The total sentence under this docket number will be 220 months. Supervised release of 3 years on each of Counts 1s, 3s and 4s, to be served concurrently. $300 Special Assessment. $200 Restitution to Ferris Market. Deft is remanded to custody of US Marshal. (1s)
18:924C.F USE OF FIREARM DURING COMMISSION OF A FEDERAL CRIME OF VIOLENCE (2s)	Imprisonment of 100 months on each of Counts 1s, 3s and 4s, to be served concurrently and a term of 120 months on Count 2s, to be served consecutively to the sentences imposed on Cts 1s, 3s and 4s. The total sentence under this docket number will be 220 months. Supervised release of 3 years on each of Counts 1s, 3s and 4s, to be served concurrently. $300 Special Assessment. $200 Restitution to Ferris Market. Deft is remanded to custody of US Marshal. (2s)
26:5861D.F POSSESSION OF AN UNREGISTERED SHORT BARRELLED SHOTGUN (3s)	Imprisonment of 100 months on each of Counts 1s, 3s and 4s, to be served concurrently and a term of 120 months on Count 2s,

	to be served consecutively to the sentences imposed on Cts 1s, 3s and 4s. The total sentence under this docket number will be 220 months. Supervised release of 3 years on each of Counts 1s, 3s and 4s, to be served concurrently. $300 Special Assessment. $200 Restitution to Ferris Market. Deft is remanded to custody of US Marshal. (3s)
18:922G.F POSSESSION OF FIREARM BY A FELON (4s)	Imprisonment of 100 months on each of Counts 1s, 3s and 4s, to be served concurrently and a term of 120 months on Count 2s, to be served consecutively to the sentences imposed on Cts 1s, 3s and 4s. The total sentence under this docket number will be 220 months. Supervised release of 3 years on each of Counts 1s, 3s and 4s, to be served concurrently. $300 Special Assessment. $200 Restitution to Ferris Market. Deft is remanded to custody of US Marshal. (4s)

Offense Level (opening): 4

Terminated Counts:	Disposition
18:1951.F INTERFERENCE WITH COMMERCE BY THREAT OR VIOLENCE; HOBBS ACT ROBBERY (1)	
18:924C.F USE OF FIREARM DURING COMMISSION OF A FEDERAL CRIME OF VIOLENCE (2)	
26:5861D.F POSSESSION OF AN UNREGISTERED SHORT BARRELLED SHOTGUN (3)	
18:922G.F POSSESSION OF A FIREARM BY A CONVICTED FELON (4)	

Offense Level (disposition): 4

Complaints	Disposition
Felon in Possession of a firearm in violation of 18 USC 922(g)(1) and 924(a)(2) [1:99-m -2]	

U. S. Attorneys:

MARGARET D. MCGAUGHEY, ESQ.
[COR LD NTC]
OFFICE OF THE U.S. ATTORNEY
P.O. BOX 9718
PORTLAND, ME 04104-5018
(207) 780-3257

JAMES MCCARTHY, ESQ.
945-0373
[COR LD NTC]
U.S. ATTORNEY'S OFFICE
P.O. BOX 2460
BANGOR, ME 04402-2460
945-0344